Supreme Court, U.S.
F I L E D
OCT 21 1992
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No. 92-568

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF OHIO,
Petitioner,
v.
DAVID WYANT,
Respondent.

STATE OF OHIO,
Petitioner,
v.
JAMES MAY, JR., et. al.,
Respondent.

STATE OF OHIO,
Petitioner,
v.
CLANCY VAN GUNDY, et. al.,
Respondent.

BRIEF IN OPPOSITION TO THE STATE OF OHIO'S PETITION FOR A WRIT OF CERTIORARI SUBMITTED ON BEHALF OF RESPONDENT ROBERT ERIC BLAZER, CODEFENDANT IN STATE OF OHIO vs. CLANCY VAN GUNDY, et. al.

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Robert Eric Blazer

QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 2927.12 of the Ohio Revised Code, increasing the penalty for certain offenses when the offender was motivated by bias, violates the First Amendment of the United States Constitution by impermissibly punishing the content of speech.

2. Whether Section 2927.12 of the Ohio Revised Code is unconstitutionally vague, thus denying due process, and whether it works to deny equal protection of the law, both contrary to the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

The immediate parties to the prosecution involving respondent Robert Blazer are the State of Ohio, herein represented by the Ohio Attorney General as counsel of record, and codefendants Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, Bryan Krebs, Charles Culp and Terry Breedlove, Jr. Parties to the companion cases are as indicated in the petition.

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Respondent Robert Blazer respectfully requests that a writ of certiorari not issue to review the judgment of the Supreme Court of Ohio entered in this proceeding on August 26, 1992. In addition to the First Amendment issue which was the basis for the decision of the Supreme Court of Ohio, respondent advances additional grounds, briefed and argued in the Ohio courts, supporting the decision in his favor.

OPINIONS BELOW

Respondent Robert Blazer was one of seven codefendants in the prosecution styled State of Ohio v. Van Gundy, et. al. The opinion of the Supreme Court of Ohio relates to this and two companion cases and is published as State v. Wyant, 64 Ohio St. 3d 566, ___ N.E. 2d ___ (1992). The opinion of the Court of Appeals of Ohio, Tenth Appellate District (Franklin County) is unpublished, as is the decision of the trial court, which was the Franklin County Court of Common Pleas. All three opinions are included in the appendix.

JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. Section 1257(3). Petitioner's invocation of 28 U.S.C. Section 1257(a) appears erroneous. The petition has been filed in a timely manner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) The statute at issue is Ohio Revised Code Sec. 2927.12:

> "(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> "(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree that the offense the commission of which is a necessary element of ethnic intimidation."

(2) The predicate offense for which respondent was prosecuted was aggravated menacing, defined as followed by Section 2903.21 of the Ohio Revised Code:

> "(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family.
> "(B) Whoever violates this section is guilty of aggravated menacing, a misdemeanor of the first degree."

(3) The First Amendment to the United States Constitution states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances."

(4) Article I, Section 11 of the Ohio Constitution provides:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

(5) Section 1 of the Fourteenth Amendment to the United States Constitution provides in part:

> "...nor shall any State deprive any person of life. liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent Blazer was one of seven codefendants, each charged with seven counts of ethnic intimidation. The substance of the charges was that "by reason of the race, color, religion or national origin" of each of the named victims, each defendant

had caused the victim to believe that the defendants, individually or collectively, would cause them to suffer serious physical harm. Each count constituted a felony of the fourth degree, carrying a potential prison term of up to eighteen months, which, if run consecutively, could total as much as ten and one-half years of imprisonment. Only codefendant Clancy Van Gundy was charged with the additional offense of felonious assault. Because there was no trial in this case the facts giving rise to charges are not a matter of record, though it may be inferred from the indictment that there was a confrontation between two groups of people and that one of the codefendants assaulted one of the alleged victims.

Respondent Blazer, along with the other defendants, moved to dismiss on constitutional grounds. Following a hearing on March 14, 1990, the judge ruled in respondent's favor and subsequently issued an opinion, stating in part:

> "***the statute provides no objective standard of conduct to guide a citizen and his counsel as to the actions proscribed. (Sec.) 2927.12 O.R.C. does not make clear the interplay between it and the related sections of the code to which it refers, does not set forth an acceptable culpable mental state nor does it make clear what must be done 'knowingly', does not define 'by reason of', and does not specify whether the race or ethnicity of another refers to the victim or someone other than the victim. It would also invite arbitrary enforcement and selective prosecution.
>
> "The statute violates the Due Process and Equal Protection Clauses in that, as it is written, it bears no reasonable relationship to a legitimate public purpose. Further, the law cannot pass Constitutional muster because the punishment of one convicted of committing an act of violence against another would not be enhanced if 'by reason of' the race, etc. of another, although the punishment would be enhanced against one convicted of merely threatening to do so."

After further noting the probable chilling effect of the statute upon First Amendment rights of speech and association, the court dismissed the ethnic intimidation counts as to all of the defendants. The felonious assault count against Clancy Van Gundy remained and Mr. Van Gundy has since been convicted of that charge.

The Court of Appeals affirmed the judgment of the trial court in an opinion rendered April 16, 1991. As did the trial court, the Court of Appeals found the statute void for vagueness under the Due Process Clause of the Fourteenth Amendment in that it failed to give a person of ordinary intelligence fair warning as to what conduct is prohibited, and because it encouraged arbitrary and discriminatory enforcement. The court also found R.C. 2927.12 infringed upon free speech as guaranteed by the First Amendment. It did not address the Equal Protection argument briefed by counsel.

The case was certified to the Supreme Court of Ohio to be considered together with cases from two other counties. Before the state supreme court claims were advanced that: (1) the ethnic intimidation statute was unconstitutionally vague, (2) that it infringed upon First Amendment rights, (3) that it was unconstitutionally overbroad, (4) that, applying equal protection considerations, it did not serve a compelling state interest, (5) that the statute could not be saved by application of a presumption of constitutionality, and (6) that it could not be saved by a narrowing interpretation. Other parties advanced

similar arguments. The decision of the Supreme Court of Ohio was rendered August 26, 1992, approximately two months after the issuance of this court's decision in R.A.V. v. City of St. Paul, Minnesota 505 U.S. ___, 112 S. Ct. 2538. The decision addressed only the First Amendment issue and affirmed the judgment of the lower courts.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The decision of the Supreme Court of Ohio is consistent with this Court's decision in R.A.V. v. City of St. Paul, Minnesota.

A. The Ohio Statute

Petitioner attempts to distinguish the Ohio ethnic intimidation statute from the St. Paul ordinance reviewed in R.A.V. v. City of St. Paul, Minnesota, 505 U.S. ___, 112 S. Ct. 2538 (1992), essentially arguing that the Ohio statute merely provides an enhanced penalty for conduct already criminalized, while the ordinance created a separate substantive offense aimed at a particular kind of conduct. This is at odds with this Court's view of the St. Paul ordinance: the R.A.V. opinion observes that the conduct in question could have been punished under a number of other laws, listed in a footnote. 112 S. Ct. at 2541 and fn. 1. While the Ohio statute does establish an increased penalty for conduct proscribed by other statutes, it does so by defining a new substantive offense, which incorporates by reference the elements of the lesser offenses, and adds the element that the offense committed was motivated by bias. Thus, the substance of the Ohio statute is identical for purposes of

constitutional review to the St. Paul ordinance, as it creates a "thought crime," in the words of the Ohio Supreme Court, or one improperly based on the content of speech following this Court's analysis in R.A.V.

Section 2927.12 of the Ohio Revised Code states:

> "(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
> "(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree that the offense the commission of which is a necessary element of ethnic intimidation."

Since no culpable mental state is specified, it would appear that by operation of Section 2901.21 of the Ohio Revised Code, the mens rea requirement as to the element of motivation for the underlying offense is either strict criminal liability or recklessness.[1]

The underlying offense for the seven counts of ethnic intimidation on which respondent was indicted was aggravated menacing, defined as follows by Revised Code Section 2903.21:

> "(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the

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[1] Section 2901.22 of the Revised Code defines four culpable mental states (purposely, knowingly, recklessly, and negligently) and allows for strict criminal liability. Section 2901.21(B) provides: "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

person or property of such other person or member of his immediate family.

"(B) Whoever violates this section is guilty of aggravated menacing, a misdemeanor of the first degree."

Briefs submitted in the state courts variously argued that the knowingly mens rea element carried over to the greater offense or that recklessness was sufficient as to the motive element, this being relevant to one of the arguments that the statute failed to provide an ascertainable standard of guilt and was thus unconstitutionally vague.

B. The Decision of the Ohio Supreme Court

In construing the Ohio statute, this Court is bound by the construction given it by the Ohio Supreme Court. R.A.V. v. City of St. Paul, Minnesota, supra, 112 S. Ct. at 2542, citing Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 339 (1986); New York v. Ferber, 458 U.S. 747, 769, fn. 24 (1982); Terminello v. Chicago, 337 U.S. 1, 4 (1949). The syllabus setting forth the holding of the Ohio Supreme Court in the present case states:

"The effect of R.C. 2927.12 is to create a 'thought crime,' in violation of Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution."[2]

In reaching this conclusion, the court examined both the aggravated menacing and ethnic intimidation statutes and concluded: "...The (ethnic intimidation) statute specifies no

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[2] Under Ohio law, the syllabus to an Ohio Supreme Court opinion states the holding of the court.

additional act or conduct beyond what is required to obtain a conviction under the predicate statutes. Thus the enhanced penalty results solely from the actor's reason for acting, or his motive." State v. Wyant, 64 Ohio St. 3d 566, 571 (1992).[3] The issue to be decided by the court was "...whether a person's motive for committing a crime can support either a separate, additional crime, or an enhanced penalty for an existing crime." Id.

The Court at some length distinguished motive from criminal intent, concluding that while motive might be evidence of intent, motive by itself was not otherwise an element of offenses defined by the Ohio Revised Code. Where the code elsewhere provided for an enhanced penalty based on aggravating circumstances, the basis was "an additional act or intent" and not whatever may have motivated the offender to act as he did. Id. at 574. Looking to state and federal anti-discrimination laws, the Court concluded that it was the discriminatory treatment or acts which were to be punished and not the bigotry leading to those acts. Id. at 575. The court went on to find that by punishing a person for their

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[3] The petition, submitted by the Ohio Attorney General, who before his election to that position had been the sponsor of the enacting legislation in the Ohio General Assembly, does not dispute this analysis. At page eight the petition states: "...A person may think or say anything they want, no matter how deplorable, and may do so without fear of punishment. Only when that motivates otherwise criminal conduct may that person be charged under Ohio law. Then any thought behind the act 'is swept up incidentally' within the conduct involved. The conduct of the person, thus, is not 'shielded from regulation' by the fact the actor had a discriminatory idea or philosophy behind commission of the act."

motives, the ethnic intimidation statue punished thought, which was protected by the First Amendment. Following discussion of West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), Beauharnais v. Illinois, 343 U.S. 250 (1952) and additional cases, the court concluded:

> "Applying these principles, we believe that the government is not free to punish an idea, though it may punish acts motivated by the idea. It may also punish unprotected speech expressing the idea." 64 Ohio St. 3d at 578.

Comparing the Ohio statute to the ordinance struck down in R.A.V. and a Wisconsin statute, comparable to, though not as vaguely drafted as the Ohio statute, which was recently struck down by the Wisconsin Supreme Court,[4] the Ohio Supreme Court stated:

> "R.C. 2927.12 constitutes a greater infringement on speech and thought than either the St. Paul or Wisconsin 'hate crimes' laws. R.C. 2927.12 specifically punishes motive, and motive alone, not action or expression. The Ohio statute singles out racial and religious hatred as a viewpoint to be punished. It is the regulation of viewpoint that most particularly violates the Ohio and federal Constitutions." 64 Ohio St. 3d 579.[5]

As discussed briefly under division II below, the Court did not address additional issues raised by respondents. The decision of the Ohio Supreme Court was unanimous, as was the decision of the Court of Appeals in State v. Van Gundy, et. al.

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[4] State v. Mitchell ___ Wis. ___, 485 N.W. 2d 807 (1992).

[5] From this passage, as well as other portions of the opinion, it is clear that the Ohio Supreme Court did not construe the statute as reaching only "fighting words."

C. Wyant and R.A.V. Compared

While the decision of the Ohio Supreme Court was issued after this court's decision in R.A.V. v. City of St. Paul, Minnesota and makes reference to R.A.V., the Ohio court's decision rests upon its independent review of Ohio law and applicable constitutional principles and not the conclusion that the holding was compelled by this Court's decision. There is no inconsistency between the decisions. Perhaps the Ohio court had the easier task because it was not bound by characterization of the statute as applying only to unprotected speech - so called "fighting words." In addition, the Court's distinction between motive and intent under Ohio law served as the foundation for its holding.

The issue of underinclusiveness was not addressed by the Ohio Supreme Court, thougn it was touched upon in the lower courts in connection with due process and equal protection claims. It is beyond reason that the Ohio ethnic intimidation statute provides an increased penalty, based on motive, for menacing conduct (itself usually manifested by speech or expressive conduct), but not for the assault it must be proved the victim of menacing or aggravated menacing subjectively believed he would suffer. In any event, the view of the majority in R.A.V. was that "...the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech"

(112 S. Ct. at 2545), and it is content discrimination that was the basis of the decision of the Ohio Supreme Court.

II. The Ohio ethnic intimidation statute is constitutionally defective on additional grounds not addressed by the Supreme Court of Ohio.

The Ohio Supreme Court chose to address only the First Amendment issue:

> "The parties also make constitutional challenges to R.C. 2927.12 on the grounds of (1) vagueness, (2) equal protection, (3) due process and (4) overbreadth. These arguments may have merit, especially in view of the concurring opinion by Justice White in R.A.V. v. St. Paul, supra...However, because of our holding we need not address these challenges. 64 Ohio St. 3d 579-580.

The trial court had sustained a motion to dismiss on all of these grounds. The opinion of the intermediate court of appeals focused on the First Amendment and vagueness issues, finding both compelling.

Because of the interrelationship among the issues, much of what respondent advanced in the lower courts in support of vagueness, overbreadth and equal protection claims is echoed in this Court's decision in R.A.V., and, to a lesser extent, in the opinion of the Ohio Supreme Court.

Vague laws make it difficult for both the citizen who must conform his conduct to the requirements of the law and for those authorities charged with enforcement, which must be uniform to be fair. Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Ohio's ethnic intimidation statute is unconstitutionally vague for a number of reasons. Related to the First Amendment arguments, the statute's vagueness contributes to its overbreadth: it fails to adequately distinguish between constitutionally protected expression and that falling within the narrow exception made for fighting words, thus allowing punishment of protected speech. The statute fails to specify whether the victim must be of a different race, color, religion, or national origin that the defendant, as do statutes in other jurisdictions.[6] The Ohio law fails to specify a scienter requirement as to the motive element, making it uncertain whether the mens rea element of the underlying offense carries over to the greater offense, or whether recklessness or strict liability applies, neither of which is appropriate when First Amendment rights are at stake. (See fn. 1 above.) Not only the police and members of the public at large are left without guidance. These shortcomings also create great practical difficulties for both a defendant, who must prepare to defend at trial, and for the court, which is given no guidance as to how the jury must be instructed.

The gist of the equal protection argument was that to increase the penalty for a criminal offense merely because the offender is a bigot is a denial of equal protection, as a

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[6] Compare Oregon Revised Statutes Sec. 166.165(1)(a)(A), New York Penal Law Sec 240.30(3) and Michigan Comp. Laws Ann. Sec. 750.147b, all of which explicitly refer to the race, religion, color, gender or national origin of the victim.

compelling state interest is not served by the differential treatment. Essentially the same rationale was followed by this Court in determining that the municipal ordinance in R.A.V. improperly penalized speech based upon its content.

Should the petition be granted, respondent asks that the parties also be directed to address the vagueness and equal protection issues.

III. Remaining Issues Raised by the Petition

Petitioner urges the Court to square the opinion of the Ohio Supreme Court with the decision in Dawson v. Delaware, 503 U.S. ___, 112 S. Ct. 1093, 117 L.Ed. 2d 309. Dawson involved consideration of the defendant's membership in the Aryan Brotherhood at the sentencing phase of a death penalty trial. The Court found this was not relevant to any of the aggravating factors, enumerated by statute, or to rebut any of the mitigation advanced. In circumstances where such evidence would be relevant, the Court concluded that the First and Fourteenth Amendments did not erect a per se barrier to introduction of evidence as to membership in a racist organization. Should Ohio's ethnic intimidation statute be upheld, or should some related provision be found to pass constitutional muster, Dawson would be instructive as to the admissibility of evidence proving bias on the part of the offender. However, it does not bear upon the determination whether or not such statutes infringe upon rights protected by the First Amendment.

As to the final issue raised by the petition, while respondent does not strenuously argue that the decision of the Ohio Supreme Court rests on independent state grounds, this court's attention is directed to the following paragraph in the opinion:

> "The freedoms of speech, press, religion and assembly are guaranteed in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. The Constitution of Ohio is even more specific; it guarantees to every citizen freedom to 'speak, write, and publish his sentiments on all subjects.' It follows that a citizen of Ohio is free to <u>have</u> 'sentiments on all subjects.'" 64 Ohio St. 3d 577.

This suggests the possibility that were this court to conclude that the statute was acceptable under the First Amendment, the Ohio Supreme Court might still conclude it was in violation of the state Constitution.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

THE STATE OF OHIO, APPELLEE, *v.* WYANT, APPELLANT.

THE STATE OF OHIO, APPELLANT, *v.* MAY, APPELLEE.

THE STATE OF OHIO, APPELLANT, *v.* STATON ET AL., APPELLEES.

THE STATE OF OHIO, APPELLANT, *v.* VAN GUNDY ET AL., APPELLEES.

[Cite as *State v. Wyant* (1992), 64 Ohio St.3d 566.]

Criminal law—Ethnic intimidation—R.C. 2927.12 unconstitutional.

The effect of R.C. 2927.12 is to create a "thought crime," in violation of Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

See: West's Ohio Digest, Extortion and Threats ⇐25.

(Nos. 91-199, 91-1519 and 91-1211/91-1589—Submitted April 15, 1992—Decided August 26, 1992.)

APPEAL from the Court of Appeals for Delaware County, No. 90-CA-2.

CERTIFIED by the Court of Appeals for Montgomery County, Nos. 12239, 12259 and 12260.

APPEAL from and CERTIFIED by the Court of Appeals for Franklin County, Nos. 90AP-473, 90AP-474, 90AP-475, 90AP-477, 90AP-478, 90AP-479 and 90AP-480.

Wyant Case: case No. 91-199

On May 29, 1989 appellant David Wyant and his wife rented campsite L-16 at Alum Creek State Park. On May 31, the Wyants' relatives came to join them, and rented L-17, the adjoining campsite. On June 2, Wyant rerented his site, but released the relatives' site, as they were to leave that day. Later in the day plans changed, and Wyant attempted to rerent site L-17. He was told that the site had been rented to someone else, and so he rented L-18.

Site L-17 had been rented to the complaining witnesses, Jerry White, and his girlfriend, Patricia McGowan. White and McGowan are black; everyone in the Wyant party is white. There was little contact between the groups for most of the evening of June 2nd, but sometime between 10:30 and 11:45 p.m., White went to park officials to complain of loud music coming from the Wyant campsite. A park official went to site L-16 and asked Wyant to turn off the radio. Wyant complied.

Fifteen or twenty minutes later the radio came on again, and White and McGowan heard racial epithets and threats made in a loud voice by Wyant.

Specifically, Wyant was heard to say: "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black mother fucker," and "I ought to kick his black ass." White and McGowan complained to park officials and left the park.

Wyant was indicted and convicted on one count of ethnic intimidation, R.C. 2927.12, predicated on aggravated menacing, and sentenced to one and one-half years' imprisonment. The court of appeals affirmed the conviction. The cause is before the court pursuant to the allowance of a motion for leave to appeal.

May Case: case No. 91-1519

Defendant James May, Jr. was charged with ethnic intimidation predicated on aggravated menacing. He moved to dismiss. The trial court dismissed on the grounds that R.C. 2927.12 is unconstitutional. The *May* case was consolidated with the *Plessinger/Staton* case on appeal.

Plessinger/Staton Case: case No. 91-1519

Defendants Aaron Plessinger and Mark Staton were charged with ethnic intimidation predicated on aggravated menacing. They moved to dismiss on the grounds that R.C. 2927.12 is unconstitutional, and on the authority of the court's decision in the *May* case. The trial court dismissed. Upon motion by the state, the court of appeals consolidated the *May* case with the *Plessinger/Staton* case. The court of appeals affirmed the trial court's dismissal of the ethnic intimidation charges, but reversed and remanded for prosecution on the aggravated menacing charges. Finding its judgment to be in conflict with that of the Fifth District Court of Appeals in *State v. Wyant* (Dec. 6, 1990), Delaware App. No. 90-CA-2, unreported, 1990 WL 200270, the court certified the record of the case to this court for review and final determination.

Van Gundy Case: case Nos. 91-1211/91-1589

Defendants Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, Robert Blazer, Bryan Krebs, Charles Culp, and Terry Breedlove, Jr. were each charged with seven counts of ethnic intimidation predicated on aggravated menacing. Clancy Van Gundy was also charged with felonious assault. He was tried and convicted on this charge. See *State v. Van Gundy* (1992), 64 Ohio St.3d 230, 594 N.E.2d 604. The trial court dismissed the ethnic intimidation counts, holding that R.C. 2927.12 is unconstitutional. The court of appeals affirmed, and, also finding its judgment to conflict with *State v. Wyant*, certified the record of the case to this court for review and final determination. This cause is also before the court pursuant to a motion for leave to appeal (case No. 91-1211). We hereby allow the motion.

W. Duncan Whitney, Prosecuting Attorney, and *Sue Ann Reulbach*, for appellee in case No. 91-199.

Lee C. Falke, Prosecuting Attorney, and *Lorine M. Reid*, for appellant in case No. 91-1519.

Michael Miller, Prosecuting Attorney, *Joyce S. Anderson* and *Katherine J. Press*, for appellants in case Nos. 91-1211/91-1589.

Lee I. Fisher, Attorney General, *Simon B. Karas* and *Eric A. Walker* as supplementary counsel, for appellee in case No. 91-199 and appellants in case Nos. 91-1211/91-1589 and 91-1519.

Randall M. Dana, Ohio Public Defender, *Susan B. Gellman* and *Robert L. Lane*, for appellant in case No. 91-199.

Terry L. Lewis, for appellee James B. May, Jr. in case No. 91-1519.

Gary C. Schaengold, for appellee Mark J. Staton in case No. 91-1519.

Gary W. Crim, for appellee Aaron L. Plessinger in case No. 91-1519.

Wonnell, Janes & Wonnell Co., L.P.A., and *Harold E. Wonnell*, for appellee Clancy Van Gundy in case Nos. 91-1211/91-1589.

Andrew E. Lyles, for appellee Casey Van Gundy in case Nos. 91-1211/91-1589.

Samuel B. Weiner, for appellee Franklin D. Clay in case Nos. 91-1211/91-1589.

James Kura, Franklin County Public Defender, *Allen V. Adair* and *Carole B. Schneider*, for appellee Robert Eric Blazer in case Nos. 91-1211/91-1589.

Tyack & Blackmore Co., L.P.A., and *Thomas M. Tyack*, for appellee Bryan Krebs in case Nos. 91-1211/91-1589.

Arnold S. White, Daniel T. Kobil and *Susan B. Gellman*, for appellee Charles Culp in case Nos. 91-1211/91-1589.

Terry Breedlove, Jr., pro se, in case Nos. 91-1211/91-1589.

Bruce W. Sanford and *Robert M. O'Neil*, urging reversal for *amicus curiae*, Thomas Jefferson Center for the Protection of Free Expression in case No. 91-199.

Thomas A. Schaffer and *Annabelle Whiting Hall*, urging reversal for *amicus curiae*, National Association of Criminal Defense Lawyers in case No. 91-199, and affirmance in case Nos. 91-1211/91-1589.

Reinhart Law Office and *Harry R. Reinhart; Eslocker, Grim, Hodson & Dioguardi* and *Nicholette Dioguardi*, urging reversal for *amicus curiae*, Ohio Association of Criminal Defense Lawyers in case No. 91-199 and affirmance in case Nos. 91-1211/91-1589.

Kevin Francis O'Neill, Ohio Legal Director, urging reversal for *amicus curiae*, American Civil Liberties Union of Ohio Foundation, Inc. in case No. 91-199.

Robert D. Horowitz, Stark County Prosecuting Attorney, *Kristine Wilson Rohrer* and *John E. Murphy*, Executive Director; and *Paul Cox*, urging affirmance for *amici curiae*, Ohio Prosecuting Attorney's Association, Fraternal Order of Police and Buckeye State Sheriff's Association in case No. 91-199.

Ronald J. O'Brien, City Attorney, *Marcee C. McCreary*, City Prosecutor, and *Thomas K. Lindsey*, urging reversal for *amicus curiae*, city of Columbus in case Nos. 91-1211/91-1589.

Jones, Day, Reavis & Pogue, Steven T. Catlett and *Richard A. Cordray; Schwartz, Kelm, Warren & Rubenstein* and *Nelson E. Genshaft; Ruth L. Lansner, Steven M. Freeman* and *Michael Sandburg*, urging reversal for *amicus curiae*, Anti-Defamation League in case Nos. 91-1211/91-1589.

Alphonse A. Gerhardstein, urging reversal for *amici curiae*, Housing Opportunities Made Equal (HOME), East Suburban Council for Open Communities, Toledo Fair Housing Center, Cincinnati Human Relations Commission and National Fair Housing Alliance in case Nos. 91-1211/91-1589.

HERBERT R. BROWN, J. The principal issue before us is the constitutionality of the ethnic intimidation statute, R.C. 2927.12. Before undertaking an analysis of the statute, however, we express our abhorrence for racial and ethnic hatred, and especially for crimes motivated by such hatred. We fully accept the premise which prompted the enactment of the legislation before us: that bigotry, whether expressed merely in words or by violence, does harm to its victims and to society as a whole.

The ethnic intimidation statute is a well-intentioned response to a society-threatening problem. However, the legislative response to this problem must not violate the Ohio and United States Constitutions. For the following reasons, we find R.C. 2927.12 unconstitutional.

I

The Statute

R.C. 2927.12 reads:

"(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

"(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The statute creates enhanced criminal penalties for some people who commit aggravated menacing (R.C. 2903.21),[1] menacing (R.C. 2903.22),[2] criminal damaging or endangering (R.C. 2909.06),[3] criminal mischief (R.C. 2909.07),[4] or certain types of telephone harassment (R.C. 2917.21[A][3], [4], or [5]).[5]

The predicate offenses to ethnic intimidation are already punishable acts under other statutes. Thus the enhanced penalty must be for something more

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1. R.C. 2903.21 (aggravated menacing) reads in part:
"(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family."

2. R.C. 2903.22 (menacing) reads in part:
"(A) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family."

3. R.C. 2909.06 (criminal damaging or endangering) reads in part:
"(A) No person shall cause, or create a substantial risk of physical harm to any property of another without his consent:
"(1) Knowingly, by any means;
"(2) Recklessly, by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance."

4. R.C. 2909.07 (criminal mischief) reads in part:
"(A) No person shall:
"(1) Without privilege to do so, knowingly move, deface, damage, destroy, or otherwise improperly tamper with the property of another."

5. R.C. 2917.21 (telephone harassment) reads in part:
"(A) No person shall knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller does any of the following:
"* * *
"(3) During the telephone call, violates section 2903.21 of the Revised Code;
"(4) Knowingly states to the recipient of the telephone call that he intends to cause damage to or destroy public or private property, and the recipient of the telephone call, any member of the family of the recipient of the telephone call, or any other person who resides at the premises to which the telephone call is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;
"(5) Knowingly makes the telephone call to the recipient of the telephone call, to another person at the premises to which the telephone call is made, or to the premises to which the telephone call is made, and the recipient of the telephone call, or another person at the premises to which the telephone call is made, has previously told the caller not to call the premises to which the telephone call is made or not to call any persons at the premises to which the telephone call is made."

than the elements that constitute the predicate offense. Our analysis begins with the identification of the "something more" that is punished under R.C. 2927.12, but which is not an element of the underlying statutory offense. R.C. 2927.12 adds only that the violation of one of the predicate statutes be "*by reason of* the race, color, religion, or national origin of another person or group of persons." (Emphasis added.) The statute specifies no additional act or conduct beyond what is required to obtain a conviction under the predicate statutes. Thus the enhanced penalty results solely from the actor's reason for acting, or his motive.[6] We must decide whether a person's motive for committing a crime can support either a separate, additional crime, or an enhanced penalty for an existing crime.

II

Criminalization of Motive

Motive, in criminal law, is not an element of the crime. In their textbook, 1 Substantive Criminal Law (1986) 318, Section 3.6, LaFave and Scott argue that if defined narrowly enough, motive is not relevant to substantive criminal law, although procedurally it may be evidence of guilt, or, in the case of good motive, may result in leniency. Other thought-related concepts such as intent and purpose are used in the criminal law as elements of crimes or penalty-enhancing criteria, but motive itself is not punished. *Id.* at 318–324; see, also, *State v. Lampkin* (Oct. 3, 1990), Hamilton App. No. C–890273, unreported, at 5, 1990 WL 143466: "While motive may be relevant as a mitigating factor in the penalty phase, it is irrelevant to the guilt-phase determination * * *"; Gellman, Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws (1991), 39 UCLA L.Rev. 333.

There is a significant difference between why a person commits a crime and whether a person has intentionally done the acts which are made criminal. Motive is the reasons and beliefs that lead a person to act or refrain from acting. The same crime can be committed for any of a number of different motives. Enhancing a penalty because of motive therefore punishes the person's thought, rather than the person's act or criminal intent.

Application of the Ohio and United States Constitutions to the statute before us requires careful attention to the distinctions between motive and intent as well as the line which separates a thought from an act. These distinctions can best be understood in the context of specific applications which arise in criminal jurisprudence.

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6. Webster's Ninth New Collegiate Dictionary (1984) 981, defines "reason" in part as "a rational ground or motive."

A

Motive versus Criminal Intent

Culpable mental state, or intent, is usually required to find one guilty of a crime.[7] "Intent" refers to the actor's state of mind or volition at the time he acts. Did A intend to kill B when A's car hit B's, or was it an accident? This is not the same as A's motive, which is *why* A intentionally killed B.[8] When A murders B in order to obtain B's money, A's intent is to kill and the motive is to get money. LaFave and Scott, *supra*, at 319. One can have motive without intent, or intent without motive. For instance, the wife of a wealthy but disabled man might have a motive to kill him, and yet never intend to do so. A psycopath, on the other hand, may intend to kill and yet have no motive.

B

Motive versus Purpose to Commit Another Criminal Act

Purpose to commit an additional criminal act is frequently seen in criminal statutes as a basis for enhanced penalty or as creating a separate, more

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7. The Ohio statute on culpable mental states, R.C. 2901.22, reads:

"(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

"(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

"(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

"(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

"(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element."

8. Black's makes the distinction as well; under the definition of "intent" it states: "Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." Black's Law Dictionary (6 Ed.1990) 810.

serious crime. For example, burglary is a trespass "with purpose" to commit a theft offense or felony.[9] Purpose in this context is not the same as motive. What is being punished is the act of trespass, plus the additional act of theft, or the intent to commit theft. Upon trespassing, A's intent is to commit theft, but the motive may be to pay debts, to buy drugs, or to annoy the owner of the property.[10] The object of the purpose is itself a crime. Thus the penalty is not enhanced solely to punish the thought or motive.

Criminal penalties are often enhanced using the concept of an aggravating circumstance. These also are distinguishable from motive. For example, under R.C. 2929.04, any of a number of aggravating circumstances can

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9. The Ohio statutes on aggravated burglary and burglary, respectively, state:

"2911.11 Aggravated burglary.

"(A) No person, by force, stealth, or deception, shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

"(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

"(2) The offender has a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

"(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

"(B) Whoever violates this section is guilty of aggravated burglary, an aggravated felony of the first degree."

"2911.12 Burglary.

"(A) No person, by force, stealth, or deception, shall do any of the following:

"(1) Trespass in an occupied structure or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense or any felony;

"(2) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be present, with purpose to commit in the habitation any misdemeanor that is not a theft offense;

"(3) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be present.

"(B) As used in this section:

"(1) 'Occupied structure' has the same meaning as in section 2909.01 of the Revised Code.

"(2) 'Theft offense' has the same meaning as in section 2913.01 of the Revised Code.

"(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) of this section is an aggravated felony of the second degree. A violation of division (A)(2) of this section is a felony of the third degree. A violation of division (A)(3) of this section is a felony of the fourth degree."

10. LaFave and Scott characterize purpose as a "medial end":

"* * * While some have taken the contrary view, it is undoubtedly better, for purposes of analysis, to view such crimes as *not* being based upon proof of a bad motive. This can be accomplished by taking the view that intent relates to the means and motive to the ends, but that where the end is the means to yet another end, then the medial end may also be considered in terms of intent." (Emphasis *sic*, footnotes omitted.) LaFave and Scott, 1 Substantive Criminal Law (1986) 320.

increase the penalty for aggravated murder to death.[11] Among these is murder committed "for the purpose of" escaping another offense. R.C. 2929.04(A)(3). The basis for enhancing the penalty in this case is once again an additional act or intent. Escaping another offense is in itself a crime. The enhanced penalty for murder does not stem from motive (*i.e.*, preference of life on the street to life in prison), but from the additional act of escape, or the intent to escape.

C

Motive versus Criminal Act

R.C. 2929.04(A)(2) declares murder for hire to be an aggravating circumstance. This is not properly seen as enhancing the penalty for a mercenary motive. Hiring is a transaction. The greater punishment is for the additional act of hiring or being hired to kill. The motive for the crime (such as jealousy, greed or vengeance) is not punished.

Some aggravating circumstances involve the identity of the victim, such as a peace officer or governmental official. R.C. 2929.04(A)(1), (6). The legislature has decided, in these instances, that acts against certain individuals are more serious criminal acts. Imposing a higher penalty for killing the Governor than for killing an ordinary citizen is similar to imposing a higher penalty for stealing a painting worth $1,000 than for stealing one worth only $5.

Under the above analysis, the legislature could decide that blacks are more valuable than whites, and enhance the punishment when a black is the victim of a criminal act. Such a statute would pass First Amendment analysis because the *motive* or the thought which precipitated the attack would not be punished. However, R.C. 2927.12 could not have been written that way

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11. R.C. 2929.04 reads in part:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

"(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. * * *

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"* * *

"(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer."

because such a statute would not survive analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

D

Motive in the Antidiscrimination Laws

Federal and state laws against discrimination in employment, housing and education do prohibit acts committed with a discriminatory motive. However, they are analytically distinct in several ways from the statute in question here. It is the *act* of discrimination that is targeted, not the motive.

There are two theories by which a case can be made under the federal laws against employment discrimination; these are characterized as "disparate impact" and "disparate treatment." Under a disparate-impact analysis, an employment practice that is neutral on its face, but falls more harshly on a protected group, can be used to show employment discrimination. *Griggs v. Duke Power Co.* (1971), 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Teamsters v. United States* (1977), 431 U.S. 324, 335–336, 97 S.Ct. 1843, 1854–1855, 52 L.Ed.2d 396, 415, fn. 15. No discriminatory motive is necessary under this analysis.

Under a disparate-treatment analysis, the employer treats some people less favorably than others because of race, color, religion, sex or national origin. Discriminatory motive is necessary to this theory. *Id.* However, proof of discriminatory motive can be inferred from differences in treatment. *Arlington Hts. v. Metro. Hous. Dev. Corp.* (1977), 429 U.S. 252, 265–266, 97 S.Ct. 555, 563–564, 50 L.Ed.2d 450, 464–465. It is discriminatory *treatment* that is the object of punishment, not the bigoted attitude *per se*. "* * * Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs, supra*, 401 U.S. at 432, 91 S.Ct. at 854, 28 L.Ed.2d at 165. It is the act of discrimination which is punished, not the thoughts (or bigotry) of the actor. Bigoted motive by itself is not punished, nor does proof of motive enhance the penalty when a discriminatory act is being punished.

III

The Constitutional Objection to Punishment of Thought

Neither the United States nor the Ohio Constitution explicitly prohibits the punishment of thought. Both guarantee the right to freedom of speech.[12]

12. The First Amendment to the United States Constitution reads:

Federal First Amendment jurisprudence has long recognized that freedom of speech presupposes freedom of thought. As Justice Stewart said in *Abood v. Detroit Bd. of Edn.* (1977), 431 U.S. 209, 234–235, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261, 284:

"[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

Likewise, Justice Jackson in *West Virginia State Bd. of Edn. v. Barnette* (1943), 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628, 1639, stated as follows:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *."

And Justice Marshall in *Stanley v. Georgia* (1969), 394 U.S. 557, 565–566, 89 S.Ct. 1243, 1248–1249, 22 L.Ed.2d 542, 550, stated as follows:

"* * * Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

"* * * [The State] cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Such statements are made in the context of cases in which laws regulate speech or expressive conduct of some kind. The question before us is not whether the government can regulate the conduct itself. Clearly the government can, and has already done so by criminalizing the behavior in the predicate statutes.[13] The issue here is whether the government can punish the conduct more severely based on the thought that motivates the behavior.

Under the First Amendment there are unprotected forms of expression. The state is allowed to punish those utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 11, Article I of the Ohio Constitution reads:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

13. The parties do not contest that the predicate offenses are punishable.

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035. It does not follow, however, that there are unprotected forms of belief.

The freedoms of speech, press, religion and assembly are guaranteed together in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. The Constitution of Ohio is even more specific; it guarantees to every citizen freedom to "speak, write, and publish his sentiments on all subjects." It follows that a citizen of Ohio is free to *have* "sentiments on all subjects."

By enacting R.C. 2927.12, the state has infringed this basic liberty. Once the proscribed act is committed, the government criminalizes the underlying thought by enhancing the penalty based on viewpoint. This is dangerous. If the legislature can enhance a penalty for crimes committed "by reason of" racial bigotry, why not "by reason of" opposition to abortion, war, the elderly (or any other political or moral viewpoint)? [14]

Within constitutional bounds, the legislature determines what constitutes a crime. We review that determination only to see if it comports with the Ohio and United States Constitutions. If the thought or motive behind a crime can be separately punished, the legislative majority can punish virtually any viewpoint which it deems politically undesirable, for example, a crime committed because the perpetrator (a) dislikes homosexuals, (b) likes homosexuals, (c) likes or dislikes the elderly—and so on. It requires little imagination to see the ramifications.

We recognize and are sensitive to the emotionally charged nature of the issues involved. We reemphasize that we in no way condone the acts and alleged acts that bring these cases before us. However, the very reason for the First Amendment and Section 11, Article I is to protect the individual against a state that is hostile simply because of the person's belief. The constitutional protection accorded to beliefs is most important when the beliefs are reviled by society. As Justice Douglas of this court has said:

"This guarantee of freedom is one of our most cherished rights and, as such, has been and continues to be under attack by persons, well-meaning and otherwise, who see attempted curtailment as being in the 'public good.' * * * It is important to often repeat that the freedoms * * * guaranteed by the

14. As Judge West of the Franklin County Court of Common Pleas said:

"[T]his statute would enhance the punishment of a crime based upon the thoughts of the defendant, a hideous legal concept and inimical to American jurisprudence." *State v. Van Gundy* (Mar. 28, 1990), Franklin C.P. No. 89-CR-11-5166, unreported.

First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Local Lodge 1297 v. Allen* (1986), 22 Ohio St.3d 228, 236, 22 OBR 407, 414, 490 N.E.2d 865, 872 (Douglas, J., concurring).

Justice Black, in his seminal dissent in *Beauharnais v. Illinois* (1952), 343 U.S. 250, 274, 72 S.Ct. 725, 739, 96 L.Ed. 919, 936, put the issue as follows:

"* * * The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'"

Justice Black's position has become the accepted one in First Amendment jurisprudence. Justice Burger addressed the issue in *Houchins v. KQED, Inc.* (1978), 438 U.S. 1, 13, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553, 564: "We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment."

Applying these principles, we believe that the government is not free to punish an idea, though it may punish acts motivated by the idea. It may also punish unprotected speech expressing the idea.

The United States Supreme Court recently addressed the constitutionality of another so-called "hate crimes" law. *R.A.V. v. St. Paul* (1992), 505 U.S. ——, 112 S.Ct. 2538, 120 L.Ed.2d 305. The St. Paul ordinance reads:

"'Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.'" *Id.*, 505 U.S. at ——, 112 S.Ct. at 2541, 120 L.Ed.2d at 315.

The St. Paul ordinance is aimed at specific conduct; that is, conduct which will arouse anger, alarm or resentment on the basis of race, color, creed, religion or gender. The Minnesota Supreme Court rejected an overbreadth claim because the ordinance had been construed to include only unprotected "fighting words." Despite this construction, the United States Supreme Court found the ordinance facially unconstitutional under the First Amendment. Justice Scalia, writing for the court, said that even the few limited categories of unprotected speech are not "entirely invisible to the Constitution." *Id.* at ——, 112 S.Ct. at 2543, 120 L.Ed.2d at 318. The government may not regulate even fighting words based on a hostility toward the message they contain. Any proscription of fighting words must not be based on

content. The court observed that the St. Paul ordinance went beyond content discrimination to viewpoint discrimination.

Quite recently the Supreme Court of Wisconsin struck down the Wisconsin "hate crimes" statute as "unconstitutionally infring[ing] upon free speech." *State v. Mitchell* (1992), — Wis.2d —, —, 485 N.W.2d 807, 808. The Wisconsin law is a penalty-enhancement statute with some similarities to R.C. 2927.12. The Wisconsin statute does not use the phrase "by reason of," but instead permits a penalty enhancement for certain crimes when the defendant "[i]ntentionally selects" the victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wis.Stat. 939.645 (1989–90). Despite this wording, the Wisconsin court said: "[The statute] is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the intentional 'conduct' of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law—punishment of offensive motive or thought." *Id.* at —, 485 N.W.2d at 813. The analysis by the Wisconsin court applies with greater force to the Ohio statute. R.C. 2927.12 refers to the actor's reasons in direct, rather than indirect, terms and is more clearly aimed at punishment of bigoted thought.

R.C. 2927.12 constitutes a greater infringement on speech and thought than either the St. Paul or Wisconsin "hate crimes" laws. R.C. 2927.12 specifically punishes motive, and motive alone, not action or expression. The Ohio statute singles out racial and religious hatred as a viewpoint to be punished. It is the regulation of viewpoint that most particularly violates the Ohio and federal Constitutions.

Based upon the foregoing authorities and our analysis of the statute, we find that the effect of R.C. 2927.12 is to create a "thought crime." This violates Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

Conduct motivated by racial or religious bigotry can be constitutionally punished under the criminal code without resort to constructing a thought crime. In fact, the behavior which is alleged in each case before us can be punished under the criminal statutes identified in R.C. 2927.12. We agree with Justice Scalia when he observed that the government "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V. v. St. Paul, supra*, 505 U.S. at —, 112 S.Ct. at 2550, 120 L.Ed.2d at 326.

The parties also make constitutional challenges to R.C. 2927.12 on the grounds of (1) vagueness, (2) equal protection, (3) due process and (4) overbreadth. These arguments may have merit, especially in view of the concur-

ring opinion by Justice White in *R.A.V. v. St. Paul, supra*, 505 U.S. at ——, 112 S.Ct. at 2550, 120 L.Ed.2d at 327. However, because of our holding we need not address these challenges.

IV

The Specific Cases Before Us

Having so held, we turn to the specific cases which are before us. Constitutional protection of thought does not shield a citizen from punishment for proscribed acts. Although the ethnic intimidation statute is invalid, the predicate offenses are punishable. As these offenses are mentioned specifically in R.C. 2927.12, they constitute lesser included offenses to ethnic intimidation.

In case No. 91-199, the jury was instructed that it could find David Wyant guilty of ethnic intimidation only if it first found him guilty of aggravated menacing. The verdict indicates that the jury found him guilty of aggravated menacing.

In case Nos. 91-1519 and 91-1211/91-1589, although the defendants cannot be tried under R.C. 2927.12, the lesser included offenses remain viable charges.

Based on the foregoing, in case No. 91-199 we reverse the court of appeals, vacate sentence on the conviction for ethnic intimidation, and remand for sentencing on the charge of aggravated menacing. We affirm the judgment of the court of appeals in case No. 91-1519. In case Nos. 91-1211/91-1589, we affirm the dismissal for ethnic intimidation, but remand for further proceedings on the underlying aggravated menacing charges.

Judgments accordingly.

In Case Nos. 91-199 and 91-1519:

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

In Case Nos. 91-1211 and 91-1589:

MOYER, C.J., UTZ, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

EUGENE J. UTZ, J., of the First Appellate District, sitting for SWEENEY, J.

State of Ohio, Plaintiff-Appellant, v. Bryan Krebs, Defendant-Appellee.	:	No. 90AP-478 (REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant, v. Charles Culp, Defendant-Appellee.	:	No. 90AP-479 (REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant, v. Terry Breedlove, Jr., Defendant-Appellee.	:	No. 90AP-480 (REGULAR CALENDAR)

O P I N I O N

Rendered on April 16, 1991

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. ALAN C. TRAVIS, for appellant.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-473
Clancy Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-474
Casey Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-475
Franklin D. Clay, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-477
Robert Eric Blazer, Defendant-Appellee.	:	(REGULAR CALENDAR)

WONNELL, JANES & WONNELL, and MR. HAROLD WONNELL, for appellee Clancy Van Gundy.

MR. ANDREW LYLES, for appellee Casey Van Gundy.

MR. SAMUEL WEINER, for appellee Franklin Clay.

MR. JAMES KURA, Public Defender, and MR. ALAN V. ADAIR, for appellee Robert Eric Blazer.

MR. DANIEL T. KOBIL, for appellee Charles Culp, Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, and Bryan Krebs.

MS. SUSAN B. GELLMAN; WHITE & STOREY, and MR. ARNOLD WHITE, for appellee Charles Culp.

THOMAS M. TYACK & ASSOCIATES, and MR. THOMAS M. TYACK, for appellee Bryan Krebs.

MR. TERRY BREEDLOVE, JR., pro se.

HAHN, LOESER & PARKS, and MR. LEE I. FISHER; JONES, DAY, REAVIS & POGUE, and MR. RICHARD A. CORDRAY, for amicus curiae Senator Lee I. Fisher.

MR. LEE FISHER, Attorney General, MR. SIMON B. KARAS and MR. ERIC A. WALKER, for amicus curiae Attorney General.

SHEPPARD AND BALE, and MR. ALAN WAYNE SHEPPARD, for amicus curiae Ohio Council of Churches.

JONES, DAY, REAVIS & POGUE, and MR. STEVEN T. CATLETT, for amicus curiae Anti-Defamation League.

MR. ALPHONSE A. GERHARDSTEIN, for amicus curiae Housing Opportunities Made Equal.

MR. RONALD J. O'BRIEN, City Attorney, MR. JAMES J. FAIS, City Prosecutor, and MR. THOMAS K. LINDSEY, for amicus curiae City of Columbus.

MR. HARRY R. REINHART; ESLOCKAR, GRIM, HODSON & DIOGUARDI, and MS. NICOLETTE DIOGUARDI, for amicus curiae Ohio Association of Criminal Defense Lawyers.

APPEALS from the Franklin County Court of Common Pleas.

BOWMAN, P.J.

On November 8, 1989, the Franklin County Grand Jury returned an eight-count indictment against appellees, Clancy Van Gundy, Casey Van Gundy, Franklin Clay, Robert Blazer, Bryan Krebs, Charles Culp and Terry Breedlove, Jr., charging each of them with seven counts of ethnic intimidation, R.C. 2927.12. The charges were predicated on the underlying offense of aggravated menacing, R.C. 2903.21, in that appellees did knowingly cause the victims to believe that appellees would cause serious physical harm to them by reason of their race, color, religion or national origin. Clancy Van Gundy was also charged with felonious assault, R.C. 2903.11, in that he did knowingly cause serious physical harm to one of the victims, Jason Harris, and with a specification, pursuant to R.C. 2941.143, in that Clancy Van Gundy did, during the commission of the felonious assault, cause physical harm to Jason Harris.

On March 14, 1990, a hearing was held before the trial court on appellees' motion to dismiss the seven counts of ethnic intimidation on the basis that the ethnic intimidation statute was unconstitutional. After arguments, the court found that R.C. 2927.12 was unconstitutionally overbroad and vague and granted appellees' motion to dismiss the seven counts of ethnic intimidation.

Thereafter, on March 28, 1990, the trial court issued a written opinion stating that R.C. 2927.12 was unconstitutional because it was vague, it violated the due process and equal protection clauses, and it had a chilling effect upon the First Amendment rights of free speech and association. The trial court dismissed Counts Two through Eight of the indictments against all of the appellees; however, Count One of the indictment, pertaining to the felonious assault charge and specification as to appellee, Clancy Van Gundy, was not dismissed and was to be tried at a later date.[1]

On April 26, 1990, appellant, the state of Ohio, appealed the dismissal of Counts Two through Eight of the indictments as to all appellees.[2] Appellant asserts the following assignment of error:

> "OHIO REVISED CODE, SECTION 2927.12, ETHNIC INTIMIDATION, VIOLATES NO CONSTITUTIONAL PROVISION AND IS NOT VAGUE OR OVERBROAD."

The issue presented to this court is whether R.C. 2927.12 is void for vagueness or is overbroad. Appellant asserts that the statute is neither vague nor overbroad and, therefore, the trial court erred in holding it

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[1] Van Gundy's subsequent conviction for felonious assault was affirmed by this court in State v. Van Gundy (Dec. 20, 1990), Franklin App. No. 90AP-556, unreported (1990 Opinions 5876).

[2] This court notes that appellee, Terry Breedlove, Jr., has failed to file a brief in this case. However, inasmuch as the facts and issues have been briefed by the remaining appellees and are identical to all parties, this court need not accept appellant's statement of the facts and issues as correct as to appellee, Breedlove, based on his failure to file a brief. See App. R. 18(C).

unconstitutional, and in dismissing the counts of ethnic intimidation against appellees.

R.C. 2927.12 provides:

> "(A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> "(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The Due Process Clause of the Fourteenth Amendment requires reasonable definiteness in the language of a statute. Roth v. United States (1957), 354 U.S. 476. In United States v. Harriss (1954), 347 U.S. 612, the United States Supreme Court stated that the constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The vagueness doctrine contemplates that criminal responsibility should not attach where an individual could not, with reasonable certainty, understand that his proposed conduct is disapproved of when measured against the language of the statute. See State v. Loless (1986), 31 Ohio App. 3d 5.

However, a statute is not void for vagueness merely because it could have been more precisely worded. Roth, supra. The legislature need not define every word of a statute, and words of ordinary usage will be given the meaning

commonly attributed to them. State v. Dorso (1983), 4 Ohio St. 3d 60. The test is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Jordan v. DeGeorge (1951), 341 U.S. 223.

The root of the vagueness doctrine is a rough idea of fairness. Colten v. Commonwealth of Kentucky (1972), 407 U.S. 104. The vagueness doctrine implies that a statute must be written so a man of common intelligence can ascertain what conduct is prohibited, and that the law must provide sufficient standards to prevent arbitrary and discriminatory enforcement. Connally v. General Const. Co. (1926), 269 U.S. 385; Papachristou v. City of Jacksonville (1972), 405 U.S. 156.

In Connally, supra, the court stated that the dividing line between what is lawful and unlawful cannot be left to conjecture. The crime, and the elements constituting the crime, must be so clearly expressed that an ordinary person can intelligently choose, in advance, what course of conduct he may lawfully pursue.

Under the void for vagueness doctrine, the statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; however, in addition, the void for vagueness doctrine also requires that the statute must provide explicit standards for those who apply it so that arbitrary and discriminatory enforcement is prevented. It is this second aspect of the void for vagueness doctrine, the requirement that the legislature establish minimal guidelines to govern law enforcement, that the courts have recently recognized as being the more important aspect of the

doctrine. Kolender v. Lawson (1983), 461 U.S. 352. Where the legislature fails to provide these minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal prejudices. Smith v. Goguen (1974), 415 U.S. 566. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, and with the danger of arbitrary and discriminatory application. Grayned v. City of Rockford (1972), 408 U.S. 104.

This court finds that R.C. 2927.12 is void for vagueness under the Due Process Clause of the Fourteenth Amendment. The statute itself does not give a person of ordinary intelligence fair warning as to what conduct is prohibited. The statute states that no person shall violate any one of the enumerated sections "*** by reason of the race, color, religion, or national origin of another person or group of persons." However, the statute does not indicate upon whose sensitivity a violation must depend: the sensitivity of the judge or jury; the sensitivity of the prosecutor; the sensitivity of the arresting officer; or the sensitivity of a hypothetical reasonable man. In addition, the statute does not give any indication who the other "person or group of persons" must be: the victim; a passerby; a group of people from the accused's past; the police; or anyone else. As such, the person must be able to foresee whether or not others, i.e., the police, prosecutor, court or jury, will at some later time determine that his or her actions were motivated by the race, color, religion or national origin of this unknown, undetermined person or the other group of persons.

More importantly, the statute is void for vagueness because it encourages arbitrary and discriminatory enforcement. The statute vests virtual complete discretion in the hands of the state to determine whether a suspect committed the alleged acts based on the race, color, religion or national origin of another person or a group of persons. The statute fails to establish standards by which police officers may determine whether or not a suspect has allegedly committed a crime as a result of the race, color, religion or national origin of another person or group of persons. As such, the statute confers on the police a virtually unrestrained power to arrest and charge persons with a violation of ethnic intimidation. See Lewis v. City of New Orleans (1974), 415 U.S. 130 (Powell, J., concurring in result). Thus, the determination of whether or not a person should be charged with ethnic intimidation is entrusted to the moment-by-moment judgment of the police in any given situation. See Kolender, supra. The statute also furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular groups who are deemed to merit their displeasure. See Thornhill v. Alabama (1940), 310 U.S. 88.

Another aspect affecting whether or not R.C. 2927.12 is constitutional is its infringement on the First Amendment right of freedom of speech. It is fundamental that statutes which regulate First Amendment activities must be narrowly drawn to address only the specific evil at hand. Broadrick v. Oklahoma (1973), 413 U.S. 601. A law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that speech which it may legitimately regulate. City of Houston v. Hill (1987), 482

U.S. 451. The Supreme Court has consistently held that statutes punishing speech or conduct solely on the ground that they are unseemly or offensive are unconstitutionally overbroad. Doe v. University of Michigan (E.D. Mich. 1989), 721 F. Supp. 852.

In Grayned, supra, the Supreme Court stated that the cases make it clear that, in assessing the reasonableness of a regulation, a court must weigh heavily the fact that communication is involved. As a result, the regulation must be narrowly tailored to further the state's legitimate interests. Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression, and that particular expressive activity cannot be prohibited because of a desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint. See Tinker v. Des Moines School Dist. (1969), 393 U.S. 503.

The Supreme Court has applied the overbreadth doctrine in the First Amendment area when the challenged law has had a "chilling effect" on constitutionally preferred liberties. Dombrowski v. Pfister (1965), 380 U.S. 479; NAACP v. Button (1963), 371 U.S. 415; Thornhill, supra. Freedom of speech is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. Staub v. City of Baxley (1958), 355 U.S. 313.

Appellant asserts that R.C. 2927.12 does not regulate speech but, rather, enhances the penalty for unlawful conduct committed for an improper motive or purpose, i.e., because of the race, color, national origin or religion

of a person or group of persons. Appellant asserts that an individual cannot be charged with ethnic intimidation unless he has already committed unlawful conduct by committing one of the enumerated crimes contained in the statute and, thus, speech is not curtailed. This court disagrees. What the ethnic intimidation statute is punishing by enhancement of the penalty for the listed criminal offenses is the spoken or written word or expression thereof by conduct.

In Texas v. Johnson (1989), 109 Sup. Ct. 2533, 2544, the court stated:

> "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. ***"

In Board of Education v. Barnette (1943), 319 U.S. 624, at 642, the court stated:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. ***"

In Terminiello v. Chicago (1949), 337 U.S. 1, the Supreme Court stated that a principal function of free speech under our system of government is to invite dispute. Free speech may indeed thus serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Merely advocating force does not remove speech from the protection of the First Amendment. NAACP v. Claiborne Hardware Co. (1982), 458 U.S. 886. While the underlying conduct, i.e., assault, menacing threats and the like, are crimes and may be punished, the government may not, by

enhancing penalties, prohibit expression simply because it disagrees with its message. Johnson, supra.

This court finds that R.C. 2927.12 is unconstitutional on its face. The statute makes a crime out of what, under the constitution, cannot be a crime since it is aimed directly at activity protected by the constitution. The First and Fourteenth Amendments do not permit a state to make criminal the exercise of the right of speech or conduct simply because its exercise may be annoying or offensive. Coates v. City of Cincinnati (1971), 402 U.S. 611. Further, because speech or conduct can be used to show the motivation behind a person's actions, a finding of guilt under R.C. 2927.12 is based on an undifferentiated mix partially for what is said and partially for what is illegally done and, as such, a conviction under the statute cannot stand. Cleveland v. Mechanic (1971), 26 Ohio App. 2d 138. See, also, State v. Johnson (1982), 6 Ohio App. 3d 56.

In most instances, the words or conduct of a person charged with ethnic intimidation will be the only indicia of his attitude or opinion on a subject, and this attitude or opinion is inseparably intertwined with the content of the statements or the conduct. Also, in most cases, it will solely be because of what a person says or what a person does that the police will perceive that a person's actions were motivated by the race, color, religion or national origin of another person or group of persons. Further, in most cases, it will be clear that, but for the remarks or the conduct, the individual would not be charged with ethnic intimidation, although he could be charged with the underlying crimes. The First Amendment's Free Speech Clause cannot be laid aside simply on

the basis that the speaker was penalized not for his speech but for a state of mind manifested thereby. See Tygrett v. Washington (1974), 543 F. 2d 840.

In City of Cincinnati v. Black (1966), 8 Ohio App. 2d 143, 146-147, the court, in holding that an ordinance which made it a crime to sell, offer for sale, or give away a pamphlet or paper which contained an article subjecting to ridicule or contempt any class or group of citizens on account of race, religious belief, or which in any manner tends to promote racial hatred or religious bigotry unconstitutional, stated:

> "It is thus seen that the ordinance undertakes to control the extent of free expression in the fields of religious and political affairs, two fields which have been given the widest possible latitude by constitutional interpretation; and also in the field of race relations which, while not written directly into either the federal or state Constitutions, has nevertheless in present day society, by judicial interpretation of the Fourteenth Amendment and by legislative enactment, received wide-spread public attention. The ordinance makes it an offense to communicate hatred and bigotry in the fields of race and religion. Bigotry and hatred reflect a mental attitude which does not necessarily become translated into human behavior. Great honor is almost universally paid to the special commandment 'that ye love one another,' but no means has as yet been found or attempted to compel this highly commendable viewpoint by law. Obviously any attempt to do so would border very closely on thought control which is resisted (even to the extent of permitting bigotry and intolerance) by every legal precept we know."

This court finds that this sentiment is equally applicable in the instant case. The constitutional protection of the First Amendment does not depend upon the truth, popularity or social utility of the ideas and beliefs put forward. Craig v. Harney (1947), 331 U.S. 367. Where First Amendment rights are

jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a court will take the extraordinary step of enjoining the state prosecution. Dombrowski, supra.

This court recognizes that, by holding R.C. 2927.12 unconstitutional, we have struck down a statute that deals with an extremely significant problem in our society. The concern of citizens with criminal activity motivated by the race, color, religion or national origin of another person or group of persons is certainly a matter requiring the attention of all branches of government. However, as weighty as this concern may be, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. While the objective of the legislation cannot be questioned and the conduct sought to be punished is reprehensible, R.C. 2917.12 in its sweeping reach and its imprecise method of enforcement is incompatible with due process requirements. These constitutional considerations may not be dismissed merely because there is a laudatory legislative end sought to be achieved. See State v. Young (1980), 62 Ohio St. 2d 370, certiorari denied Ohio v. Young (1980), 449 U.S. 905.

Therefore, based on the foregoing, this court finds that the trial court did not err in determining that R.C. 2927.12 was unconstitutional. The statute allows arbitrary and discriminatory action by police, prosecutors, courts and juries permitting them, on a case-by-case basis, to subjectively determine whether the conduct or speech or action before them violates the statute. It does not provide fair warning to a person of ordinary intelligence that

contemplated conduct will violate the statute because it is overbroad and violates the First Amendment right to free speech and conduct. Accordingly, appellant's assignment of error is not well-taken and is overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

YOUNG and KLINE, JJ., concur.

KLINE, J., of the Pickaway County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

11266820

STATE OF OHIO :

PLAINTIFF, :

VS. : CASE NO. 89-CR-11-5166
A,B,C,D,E,F,G

CHARLES CULP
~~CLANCY VAN GUNDY~~, ET AL : JUDGE WEST

DEFENDANTS :

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OPINION

This matter came on to be heard by written Motions to Dismiss Counts Two through Eight of the Indictments submitted by Defendants Culp, Clancy Van Gundy, and Breedlove and upon the oral motions of the other defendants at hearing, for the reasons advanced by counsel for Culp and Clancy Van Gundy. The Prosecution filed memoranda contra to the written motions and expressed no opposition to the other defendants joining in the Motions at hearing.

The reasons advanced in the Motions to Dismiss were that the statute on its face violates the First, Sixth and Fourteenth Amendments to the U.S. Constitution and Article One, Section Eleven of the Ohio Constitution. The Court agrees and sustains the Motion to dismiss Counts Two through Eight of the Indictment.

Defendants were indicted in felony Counts Two through Eight for violation of (2927.12 O.R.C by reason of (2903.21 O.R.C.(a misdemeanor). Motions were filed by various defendants, and the Court set March 14, 1990 as the date for hearing all pending motions, including the Motions to Dismiss. No facts were placed in evidence, and the hearing was based solely on the pleadings and the law.

The law presumes a statute constitutional Courts are instructed to give the words of a statute their plain meaning when no expression of legislative intent in published. However, where a law is so written that persons "of common intelligence must guess as to its meaning and differ as to its application" it must be struck as void for vagueness. Connally v. General Construction Co., 269 U.S. 385, 391. The Court finds that (2927.12 O.R.C. requires a person of normal intelligence to "speculate as the meaning" of this penal statute. See State v.Kasnett, 34 O.S.2d 193.

The Court notes that the statute provides no objective standard of conduct to guide a citizen and his counsel as to the actions proscribed. (2927.12 O.R.C. does not make clear the interplay between it and the related sections of the code to which it refers, does not set forth an acceptable culpable mental state nor does it make clear what must be done "knowingly", does not define "by reason of", and does not specify whether the race or ethnicity of another refers to the victim or someone other than the victim. It would also invite arbitrary enforcement and selective prosecution.

The statute violates the Due Process and Equal Protection Clauses in that, as it is written, it bears no reasonable relationship to a legitimate public purpose. Further, the law cannot pass Constitutional muster because the punishment of one convicted of committing an act of violence against another would not be enhanced if "by reason of" the race, etc. of another, although the punishment would be enhanced against one convicted of merely threatening to do so.

The Court also finds that this statute is void because of its chilling effect upon First Amendment rights of speech and association. In effect, this statute would enhance the punishment

of a crime based upon the thoughts of the defendant, a hideous legal concept and inimical to American jurisprudence.

The indictments as to all the defendants as set forth in Counts Two though Eight are hereby dismissed. Defendant Clancy Van Gundy still stands accused as indicted in Count One and his trial shall remains set for May 20, 1990. All other motions pending are rendered moot by reason of this opinion.

11266C02

JUDGE

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FULL TEXT OF STATUTES CITED

Section 750.147, Michigan Comp. Laws Ann.

(1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:

(a) Causes physical contact with another person.

(b) Damages, destroys, or defaces any real or personal property of another person.

(c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is substantial cause to believe that an act described in subdivision (a) or (b) will occur.

Section 240.30(3), New York Penal Law

A person is guilty of aggravated harassment in the second degree when with intent to harass, annoy, threaten, or alarm another person, he:

***

3. Strikes, shoves, kicks or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion or national origin of such person."

Section 2901.21, Ohio Revised Code (Requirements for criminal liability)

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

(C) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have ended his possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

Section 2901.22, Ohio Revised Code (Culpable mental states)

(A) A person acts purposely when his specific intention is to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with a heedless indifference to the consequences, he perversely disregards a known risk that his conduct will cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with regard to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

Section 2903.21, Ohio Revised Code (Aggravated menacing)

(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family.

(B) Whoever violates this section is guilty of aggravated menacing, a misdemeanor of the first degree."

Section 2927.12, Ohio Revised Code (Ethnic intimidation)

(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree that the offense the commission of which is a necessary element of ethnic intimidation."

Section 166.165(1)(a)(A), Oregon Revised Statutes

Two or more persons acting together commit the crime of intimidation in the first degree, if the persons:

(a)(A) Intentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin or sexual orientation."